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No. 97-786

In the Supreme Court of the United States

OCTOBER TERM, 1997

ROBIN CLIFTON
AND MAINE RIGHT TO LIFE COMMITTEE, INC.,
PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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15 pp

QUESTIONS PRESENTED

The instant case involves a facial challenge brought by petitioners to a regulation promulgated by the Federal Election Commission. The regulation establishes standards for determining the propriety of "voter guides" disseminated by corporations and labor unions. The district court held that the regulation is invalid in its entirety. The court of appeals resolved most of the disputed issues in petitioners' favor, holding that the bulk of the regulation is unauthorized by the governing statute and therefore invalid. The court remanded the case to the district court, however, to determine whether one provision of the regulation is severable from the rest of the rule and, if so, whether that provision is valid. This case presents the following question:

Whether the court of appeals committed any error warranting this Court's review in remanding this case to the district court for further proceedings concerning one aspect of the challenged regulation, rather than affirming the judgment of the district court in its entirety.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-59) is reported at 114 F.3d 1309. The opinion of the district court (Pet. App. 60-83) is reported at 927 F. Supp. 493.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 1997. Petitions for rehearing were denied on June 27, 1997, and August 8, 1997. Pet. App. 85-87. The petition for a writ of certiorari was filed on November 6, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Election Campaign Act of 1971 (FECA or Act), 2 U.S.C. 431 *et seq.*, provides that "[i]t is unlawful * * * for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). The FECA defines "contribution" to include

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or
>
> (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

2 U.S.C. 431(8)(A).

The Act defines the term "expenditure" to include

> (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
>
> (ii) a written contract, promise, or agreement to make an expenditure.

2 U.S.C. 431(9)(A).

The Act provides that "expenditures made by any person in cooperation, consultation, or concert, with" a candidate or the candidate's agents—commonly known as "coordinated" expenditures, see *Buckley* v. *Valeo*, 424 U.S. 1, 46 (1976) (per curiam)—"shall

be considered to be a contribution to such candidate." 2 U.S.C. 441a(a)(7)(B)(i).[1]

2. In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court construed and clarified the scope of the statutory ban on corporate campaign expenditures. First, the Court held that an independent expenditure "must constitute 'express advocacy' [of the election or defeat of an identified candidate] in order to be subject to the prohibition of [2 U.S.C.] § 441b." *Id.* at 249. Second, the Court held that MCFL itself was entitled to a narrow, constitutionally based exception to the statutory bar, even though it had engaged in "express advocacy." The Court explained that MCFL (1) "was formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) "has no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities." *Id.* at 264. Because those features "essential to [the Court's] holding" obviated the concerns underlying Section 441b, the Court concluded that corporations with those three features "may not constitutionally be bound by § 441b's restriction on independent spending," *id.* at 263-264,

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[1] "[I]ndependent expenditure[s]," by contrast, are defined as "expenditure[s] by a person expressly advocating the election or defeat of a clearly identified candidate which [are] made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which [are] not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. 431(17).

even with respect to payments made for express advocacy of the election or defeat of identified candidates.

3. In 1995, the Federal Election Commission (FEC or Commission) promulgated a regulation describing the circumstances under which corporate or union disbursements for "voter guides" will be regarded as "coordinated" with a candidate, and therefore as unlawful "contributions." Essentially, the regulation establishes two alternative methods by which the corporation or union may show that its disbursements are not coordinated with a candidate.

First, the organization may refrain from all contact with the candidate or his agents "regarding the preparation, contents and distribution of the voter guide." 11 C.F.R. 114.4(c)(5)(i). If the organization satisfies that requirement, the only limitation on the permissible contents of the voter guide is that the guide may not "expressly advocate the election or defeat of one or more clearly identified candidate(s) * * * of any clearly identified political party." *Ibid.* Alternatively, the corporation or labor union may submit written questions to, and receive written responses from, the candidates or their agents. If the organization engages in such contact, it must adhere to several other requirements. The organization must afford all candidates for a given office "an equal opportunity to respond," 11 C.F.R. 114.4(c)(5)(ii)(B); "[n]o candidate may receive greater prominence in the voter guide than other participating candidates, or substantially more space for responses," 11 C.F.R. 114.4(c)(5)(ii)(C); "[t]he voter guide and its accompanying materials shall not contain an electioneering message," 11 C.F.R. 114.4(c)(5)(ii)(D); and "[t]he voter guide and its accompanying materials shall not score or rate the candidates' responses in such a way as

to convey an electioneering message," 11 C.F.R. 114.4(c)(5)(ii)(E).

4. Petitioners brought a facial challenge to the regulatory provisions described above. The district court held that the regulation was not authorized by the FECA and was therefore invalid. Pet. App. 60-83. In the district court's view, the regulation placed impermissible limitations on issue advocacy by corporations and unions. The court concluded that "[a]ny oral contact concerning the content of a voter guide—questions to clarify a candidate's position, for example—results in outright prohibition of corporate issue advocacy through use of the guide." *Id.* at 70-71. "Even written contact with candidates," the court stated, "results in severe constraints on issue advocacy [that is] otherwise entitled to broad First Amendment protection under" this Court's precedent. *Id.* at 71 (citation omitted).

The district court noted that it was "sympathetic to the argument that enforcement is more difficult if the FEC cannot prohibit all oral communications and make enforcement decisions on simple criteria easily applied to written questions and answers." Pet. App. 76-77. The court concluded, however, that, "as long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the FEC cannot use the mere act of communication between a corporation and a candidate to turn a protected expenditure for issue advocacy into an unprotected contribution to the candidate." *Id.* at 77. Apparently believing that the regulatory ban on any "electioneering message" in corporate or union voter guides disseminated after written contact with the candidate (see 11 C.F.R. 114.4(c)(5)(ii)(D)) was inseverable from the other challenged provisions, the court

declined to reach petitioners' challenge to that ban. See Pet. App. 77 n.7. The court therefore held the regulation to be invalid in its entirety. *Id.* at 78.

5. The court of appeals modified the district court's judgment and remanded the case for further proceedings. Pet. App. 1-59. The court observed that petitioner Maine Right to Life Committee, Inc. (Maine Committee), unlike the corporation involved in *MCFL*, accepts contributions from other corporations. *Id.* at 8. The court regarded it as "unclear what the Supreme Court would say about the existence or extent of a constitutional right of campaign-related issue advocacy (using unsegregated funds) claimed by the Maine Committee." *Ibid.* The court concluded, however, that it need not resolve that question. *Id.* at 9. It explained that, in its view, "the two main FEC rules at issue"—*i.e.*, the ban on oral contacts with candidates and the equal prominence requirement that applies where the corporation has had written contacts with the candidate—"curtail constitutional rights that corporations unquestionably do possess." *Ibid.*

Apart from the impact of those requirements on a corporation's issue advocacy, the court viewed the regulation as impinging on two separate constitutional rights. First, the court regarded the "equal prominence" requirement as inconsistent with the principle that, "where public issues are involved, government agencies are not normally empowered to impose and police requirements as to what private citizens may say or write." Pet. App. 9 (citing *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974)). Second, the court found the "written contact" requirement to be "patently offensive to the First Amendment in a different aspect: it treads heavily

upon the right of citizens, individual or corporate, to confer and discuss public matters with their legislative representatives or candidates for such office." *Id.* at 12. The court did not squarely hold that the FEC regulation is unconstitutional, or that Congress would lack authority to enact an equivalent rule. Rather, relying on the "long tradition of construing statutes narrowly to avoid constitutional issues," it stated that, "[e]ven if the rules are otherwise 'reasonable,' we do not take Congress to have authorized rules that sacrifice First Amendment interests." *Id.* at 15.

The court of appeals expressed uncertainty, however, whether (as the district court had apparently assumed) the restriction on "electioneering messages" is inseverable from the "equal prominence" and "written contact" rules. See Pet. App. 18 (stating that "an argument can be made that the electioneering message ban, if valid, can stand on its own two feet"). The court also indicated that it was uncertain as to the meaning of the phrase "electioneering message" and its relation to the concept of "express advocacy." *Id.* at 17. The court stated that it regarded the parties' briefing of that question as "perfunctory," *ibid.*, and that it "ha[d] no intention of trying to resolve any of the issues thus implicated," *id.* at 18. The court of appeals therefore remanded the case to the district court to determine whether the "electioneering message" restriction is severable from the other challenged provisions and, if so, whether the restriction is valid. *Ibid.*[2]

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[2] Judge Bownes dissented, stating that he regarded the challenged regulatory provisions as reasonable prophylactic

ARGUMENT

Petitioners substantially prevailed in this case, obtaining an appellate decision that declared invalid the bulk of the Commission's voter guide regulation. Indeed, petitioners' only quarrel with the court of appeals' judgment is that the court remanded the case to the district court for further consideration of an issue that the court of appeals believed to have been briefed in a "perfunctory" manner. Because petitioner prevailed on the issues finally resolved by the court of appeals, and because of the current interlocutory posture of the remaining portion of the case, the petition should be denied.

1. The court of appeals declared invalid (see Pet. App. 18-19) the "written contact" and "equal prominence" requirements of the Commission's voter guide regulation—provisions that the court regarded (*id.* at 9) as "the two main FEC rules at issue" in this case. In the course of its opinion, the court made two assertions with which petitioners disagree. First, the court characterized this Court's decision in *MCFL* as "recogniz[ing] a First Amendment right to issue advocacy[] on behalf of a nonprofit corporation" that, *inter alia*, refused to accept contributions from business corporations or labor unions. *Id.* at 7. Second, the court regarded it as "unclear what the Supreme Court would say about the existence or extent of a constitutional right of campaign-related issue advocacy (using unsegregated funds) claimed by the Maine Committee." *Id.* at 8. Petitioners, by contrast, read this Court's decisions as squarely holding that corporate disbursements for campaign-related com-

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rules designed to guard against both the fact and appearance of corruption in electoral campaigns. Pet. App. 19-59.

municative activities "are protected against governmental infringement under the First Amendment unless they constitute 'express advocacy' of the election or defeat of a clearly identified candidate." Pet. 5-6.

Any imprecision in the court of appeals' opinion does not warrant this Court's review.[3] The court

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[3] The Court in *MCFL* held, as a matter of statutory construction, that the independent corporate "expenditures" prohibited by 2 U.S.C. 441b are limited to disbursements made for express advocacy of the election or defeat of identified candidates. See 479 U.S. at 248-249. Thus, even if a corporation does not qualify for the "*MCFL* exemption" (see pp. 3-4, *supra*), Section 441b does not prohibit it from making independent disbursements for campaign-related speech, so long as that speech does not include "express advocacy" of particular electoral results. Although the *MCFL* Court's construction of the statute was clearly informed by constitutional concerns, see 479 U.S. at 248-249, the Court did not squarely hold that the express advocacy standard is constitutionally compelled. We therefore agree with the court of appeals that this Court has not definitively resolved the question whether corporations have a First Amendment right to engage in independent campaign-related issue advocacy. Petitioners are wrong, however, in stating that "the court of appeals' crucial holding is that a corporation does not have a right to make 'expenditures' for 'issue advocacy' unless it satisfies the three prongs of the '*MCFL* exemption.'" Pet. 13 (footnote omitted). Rather than holding that corporations generally lack such a right as a constitutional matter, the court of appeals made it entirely clear that it was reserving the question. See Pet. App. 8-9.

Petitioners are correct, however, in stating that corporations that satisfy the three *MCFL* criteria (see p. 3, *supra*) are constitutionally entitled to make independent disbursements for express advocacy as well as issue advocacy. Pet. 16-17; see 479 U.S. at 263-264. Insofar as the court of appeals' opinion suggests a narrower reading, see Pet. App. 7 (stating that *MCFL* "recognized a First Amendment right to issue advocacy" for

concluded that it need not determine the scope of the Maine Committee's constitutional right to engage in issue advocacy because it found the Commission's "written contact" and "equal prominence" requirements to be invalid on alternative grounds. See Pet. App. 9, 15-16; pp. 6-7, *supra*. Because this Court "reviews judgments, not statements in opinions," *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)), petitioners' dissatisfaction with the court of appeals' mode of analysis provides no basis for invoking this Court's review.

2. Petitioners' only quarrel with the court of appeals' *judgment* is that the court remanded the case to the district court to determine whether the "electioneering message" restriction is severable from the rest of the Commission's voter guide regulation and, if so, whether the restriction is valid. Pet. App. 18. The court made clear, however, that it was remanding the case because it found the briefing on the "electioneering message" question to have been "perfunctory"; because it was uncertain how (if at all) the "electioneering message" standard differs from an "express advocacy" test; and because it did not believe the inseverability of the "electioneering message" restriction to be readily apparent. *Id.* at 17-18. The court of appeals' determination that further proceedings on this issue are appropriate raises no question warranting this Court's review.[4]

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corporations satisfying the stated criteria), we believe that the court was in error. As we explain in the text, however, any such error did not affect the court's *judgment*.

[4] Indeed, even where a court of appeals has definitively resolved a contested legal issue, this Court generally will deny

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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certiorari if the case is in an interlocutory posture. See, *e.g.*, *Virginia Military Institute* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari) (this Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction"); *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"). The unsuitability of the instant case for this Court's review is all the more apparent, since the court of appeals has simply held that the validity of the "electioneering message" restriction remains an open question.